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SETTLEMENT COMMUNICATION
SUBJECT TO US/CARB/KOHLER CONFIDENTIALITY AGREEMENT
CONTAINS CONFIDENTIAL BUSINESS INFORMATION

April 4, 2018

VIA EMAIL

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Re: Kohler Response to Penalty Demand

Dear Messrs/Mmes:

On behalf of Kohler Co. ("Kohler"), we write to follow up on our March 29, 2019 letter regarding our request for a meeting with the United States' and California's enforcement leadership to afford us an opportunity to respond to your penalty demand of (b) (4) We strongly believe that the demand is excessive, unfair and disproportionate, and would contravene rather than advance the government's overall enforcement and compliance objectives, particularly in light of EPA's May 15, 2018 announcement of a renewed emphasis on encouraging compliance through self-disclosure, expeditious correction and steps to prevent recurrence of environmental violations. Our preference has been to explain our counter-offer and the rationale for it directly to the government's enforcement leadership in a face-to-face meeting, and we summarized the topics we would address in the March 29th letter. We understand, however, that before a meeting with the enforcement leadership can take place, you require us to provide our counter-offer and rationale, and so we do that in this letter. In doing so, we want to emphasize that we seek this meeting now, at a point that might be viewed as early in the negotiations, due to the (b) (4) amount of the penalty sought. Such a penalty would be (b) (4) and is not supported by the facts of this case. Respectfully, we believe the demand reflects erroneous underlying assumptions that warrant the early attention of enforcement leadership.

(b) (4)

(b) (4) The principal grounds for our position are as stated in our March 29 letter:

(1) Kohler's (b) (4) in bringing these (b) (4) (b) (4) warrants much greater weight than that reflected in a (b) (4) demand;

(b) (4)

[redacted]

(4) The demand is disproportionate to penalties in other cases and far exceeds any reasonable penalty calculated from EPA's Mobile Source Penalty Policy.

We further explain these reasons below, and we will elaborate and discuss each of these at the meeting we are requesting.

* * *

1. *A Penalty Should Account for Kohler's Proactive* [redacted]

Since its self-disclosure in late 2015, Kohler has sought to conduct itself precisely as the government would want. [redacted]

[redacted]

(b) (4)

2. *An Appropriate Penalty Should Account for the Absence of Excess Emissions.*

The gravity of the harm from this noncompliance does not support a (b) (4) (b) (4) penalty, because, first and foremost, (b) (4)

(b) (4)

a. *There Were* (b) (4)

(b) (4)

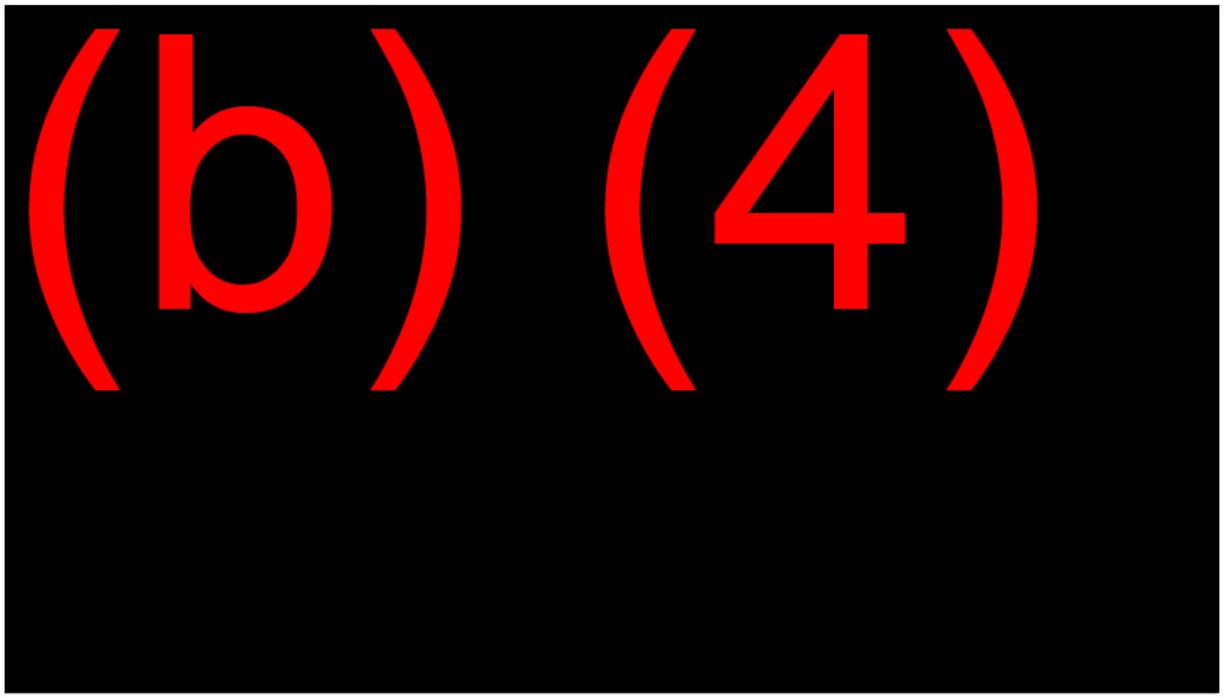
b. *The Emissions from the* (b) (4)

(b) (4)

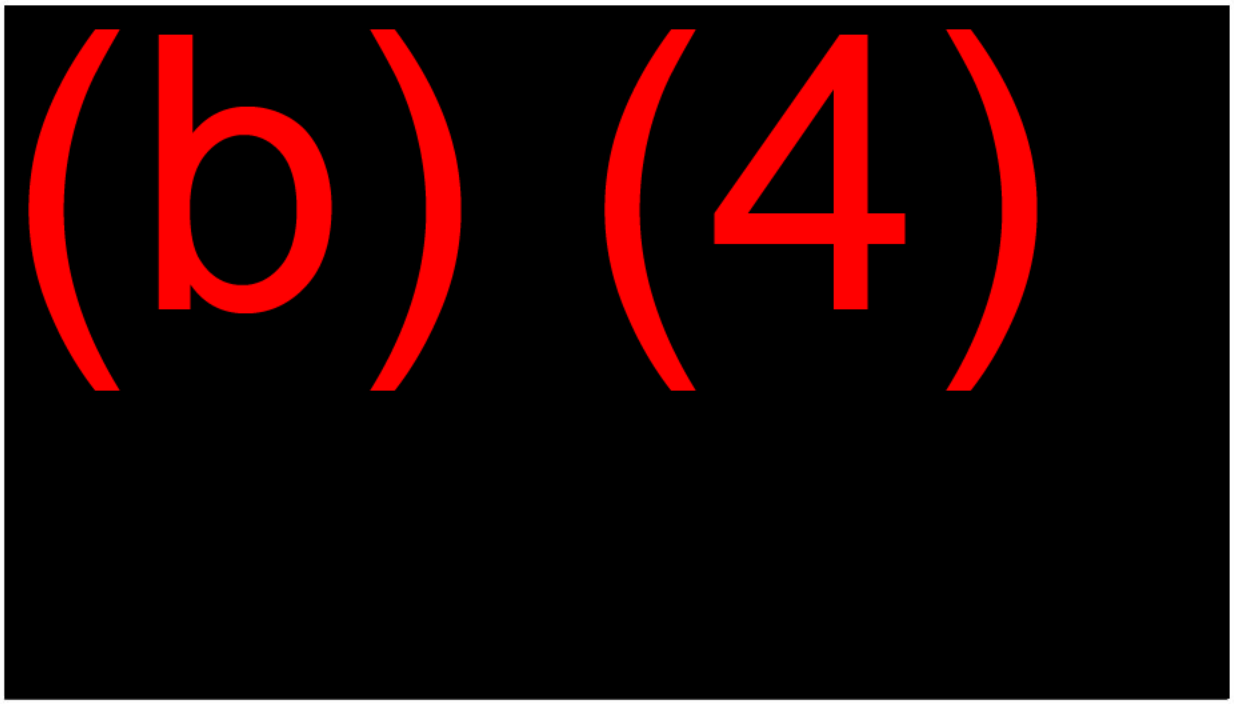
(b) (4) These key facts make this case very different from other cases involving much larger and higher-emitting motor vehicles, in which cases the agencies have asserted that emissions were 20-30 times the legal limit with significant actual harm to the environment, and where the companies could not have lawfully sold any of the vehicles as they were originally configured under any circumstances.

3. *The Agencies Have Substantially Overstated Economic Benefit*.

a. *The Agencies' Analysis of* (b) (4) *is Incorrect*.



b. *The Agencies'* (b) (4) *is Incorrect.*



(b) (4)
(b) (4) And Section 205(b) of the Clean Air Act itself specifies that the relevant penalty factor is "the economic benefit or savings (if any) resulting from the violation." (b) (7)(E)
(b) (7)(E)

(b) (4)

4. *The* (b) (4) *Demand is Disproportionate to Key Benchmarks*.

We note that the agencies have declined to share any quantified analysis for how they arrived at the gravity component of the (b) (4) penalty demand, so we are unable to address the inputs and assumptions of that analysis. However, when considering relevant benchmarks and the statutory penalty factors a court would apply, we do not think a (b) (4) demand can be justified. In contrast, an (b) (4) penalty is well justified.

a. *Impact on Kohler's Engines Business*.

(b) (4)

b. *Comparison to Other Recent, Similar Cases*.

It is also reasonable to consider settlements in other similar mobile source cases. In that regard, we can estimate from publicly available information that the penalty in the FCA case was less than one-third of the total profit from the sale of the pickup trucks and SUVs in question. In contrast a (b) (4) penalty here would be

(b) (4) This is particularly jarring where Kohler self-disclosed (b) (4) and proactively worked with the agencies both to resolve outstanding regulatory issues and (b) (4) and provide information to the government enforcement team. (b) (4) the Harley-Davidson case, which involved the sale of hundreds of thousands of tuners allegedly sold for use as defeat devices on large motorcycles. Moreover, unlike this case, Harley-Davidson did not self-disclose.

c. *Calculations Under EPA's Mobile Source Penalty Policy*.

In developing our counter-proposal, we have also sought to calculate the penalty using EPA's Mobile Sources Penalty Policy. We have input the economic benefit results as described above, scaled penalties for the (b) (4) and other engines separately, applied increases and only a partial self-disclosure discount, and calculated the effect of considering both the Kohler Engines business and the Kohler Co. enterprise with respect to the size of violator. Our results are consistent with Kohler's (b) (4) counter-offer, and totally inconsistent with the (b) (4) demand.

* * *

Kohler's counter-proposal is a reasonable and appropriate penalty taking into account all of these guideposts and would remove any economic benefit many times over. (b) (4)

(b) (4)

We look forward to meeting with you to elaborate on our perspective.

Sincerely,

Jonathan S. Martel
Joel M. Gross

cc: (b) (4)